IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 154

CHRISTIAN A. JOHNSON AND CAMERON BIEWEND INDIVIDUALLY AND AS A COMMITTEE OF THE COMMON STOCKHOLDERS OF ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

v.

SECURITIES AND EXCHANGE COMMISSION

AND

ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

1. No extended comment is necessary in regard to the Brief of Electric Power & Light. This Brief contends that the standards for compensation of committees are factual matters and are not a subject of conflict in the Courts. Since the Brief of the Commission (Page 10) frankly concedes that the application of the concept of benefit "has produced dispute in the courts," we turn to the latter Brief.

2. One question raised by the Brief of the Respondent Securities and Exchange Commission requires clarification. On page 10 of its Brief, the Commission states as follows:

> "The more restrictive concept of 'benefit' as excluding any compensation at all for unsuccessful activities in opposition to a plan has produced dispute in the courts,

> but is not involved in this case. The general concept that compensation must be measured primarily by benefit to the estate is embodied in most of the authorities cited by the petitioners".

The Commission then cites *Collier on Bankruptcy, In re Engineers Public Service Company* 116 F. Supp. 930 (D. Del., 1953) and *Heenehan* v. *Prudence Realization Corp.* 108 F. 2d 103 (C.C.A. 2, 1940) as authority that "benefit" is generally accepted as the primary criterion of compensation. The Commission argues that the sole question which "has produced dispute in the courts" is whether compensation can be completely denied to Committees where activities in opposition to a plan have been unsuccessful. The Commission argues that there is no difference of opinion in the Courts as to the requirement of "Benefit" where total compensation is not denied.

The Commission's position is misleading. The word "benefit" as used in cases involving compensation in reorganizations can have two distinct meanings, which are very often confused with each other. One meaning refers to the measure of success in opposing or supporting a Plan of Reorganization. A second meaning refers to the "benefit" resulting from competent and reasonable presentation of *bona fide* questions of law and fact. It is the latter sense in which Collier's treatise expressly uses the term:

> "Under former Sec. 77B the theory grew up that 'benefit to the estate' generally meant activities which related to the successful consummation of a plan. But opposition to a plan, even though unsuccessful, may be both desirable and beneficial, and aggressive action by minority groups is sometimes necessary against entrenched interests who wish to dominate the reorganization for their own advantage." Collier on Bankruptcy, Vol. 6, p. 4537.

However, as pointed out by petitioners brief, the Commission has used the term "benefit" to require an advantageous

change in a Plan of Reorganization. Petitioners' Brief was addressed to the impropriety of this so-called "Benefit Rule". The Commission's position is clearly demonstrated by *In re Engineers Public Service Company* 116 F. Supp. 930 (D. Del. 1953) in which the Commission unsuccessfully sought to deny all compensation to counsel for loss of a *bona fide* appeal. It is odd that the Commission (on page 11 of its Brief) cites the *Engineers* and *Heenehan* cases as authorities for its position. These cases both held that compensation should be granted irrespective of success in litigation where *bona fide* issues were raised. The Commission then states that these authorities "accept the view applied by the Commission in this case"—namely that compensation to Committees is appropriate even where there is no success in litigation. However, the Commission is now appealing the *Engineers* case and has taken the unequivocal position in that case that no compensation should be granted for unsuccessful litigation. (*In re Engineers Public Service Company 116 F. Supp. 930 at 934*). Thus, the Commission cites a case and a point of law favorably here, while it fights both the case and the point of law tooth and nail in another court. Such inconsistency is, to say the least, unusual.

The Commission's brief states that there is a conflict in the Courts as to whether *all* rather than *some* compensation can be forfeited as a result of unsuccessful activities in respect to a plan. It further argues, with considerable ingenuity, that since *some* compensation was granted petitioners, the present dispute in the Courts is not involved in this case. Actually, the compensation granted to petitioners was nominal, and was therefor in effect denied.[1] The Commission's argument is therefor irrelevant. But in any event, careful analysis of the Commission's point discloses

[1]The Commission's brief (Page 7) states that $21,000. was paid to petitioners, but does not mention that $11,500. were committee disbursements and that their allowance was never a matter of dispute. Only $9,500. was paid to cover fees of the Committee, and as noted this sum barely, if at all, covered overhead costs.

that the Commission is really taking the position that unsuccessful activity in opposition to a plan is not a "benefit" and hence not compensable in any appreciable amount. Its position is therefor, a restatement of the outmoded Rule, (referred to as the "Benefit Rule" in Petitioners' Brief), which was generally accepted prior to Chapter X, and which is unsound.

The Commission seeks to persuade this Court that, although the Commission does not favor any compensation for unsuccessful litigation, nevertheless it did grant some compensation in this case and therefor petitioners have not been harmed by the Commission's inconsistent application of its own rule. The fact of the matter is that the Commission's present policy virtually denies compensation to all unsuccessful litigants on the ground that they have not conferred a "benefit" on the estate. If the Commission has thereby applied improper legal standards, it has done so whether or not it allows a modest compensation, nominal compensation, or none at all. It is abundantly clear from both Briefs that there is a broad dispute in the Courts as to the proper criterion of compensation of Committees and that this question has long been ripe for final determination. It is squarely at issue in the instant case.

Respectfully Submitted

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ERRATA NOTICE

1). Page 12 of Petitioners' Brief. In the first line of the paragraph entitled *Fifth,* the word "Commission" should be changed to "Committee".

2). The quotation from Judge Hincks' opinion cited on page 17 is to be found in the Record on Appeal in *Manhattan Co.* v. *N. Y., N. H. & H. R. Co.* 171 F. 2d 482 (C.C.A. 2d, 1948) rather than at the indicated citation. Judge Hincks took essentially the same position in the opinion cited in the Brief (*In re New York, N. H. & H. R. Co.,* 46 F. Supp. 214, 234 (D. Conn. 1942) where he stated:

> "And so, even services in conducting litigation which results unsuccessfully are entitled to compensation at a rate which will subject counsel to no positive hardship".